

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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WMCV PHASE 3, LLC,

Plaintiff(s),

vs.

SHUSHOK & MCCOY, INC., et al.,

Defendant(s).

2:10-cv-00661-GMN-NJK

REPORT & RECOMMENDATION

Before the Court is Defendant Global Accents, Inc.'s Motion for Attorneys' Fees and Costs Pursuant to Rule 54(d) and LR 54-16; Amended Judgment for Award of Fees, Expenses, and Costs. Docket No. 213. The Court has considered Defendant's Motion, Plaintiff's Opposition, and Defendant's Reply. The Court finds this motion appropriately resolved without oral argument. *See* Local Rule 78-2. For the reasons discussed below, the undersigned Magistrate Judge recommends that the Court GRANT in part Defendant's motion and award attorneys' fees in the amount of \$32,769.98, plus interest, and costs in the amount of \$1,100.

I. BACKGROUND**A. General Background**

Plaintiff WMCV Phase 3 (Plaintiff) operates commercial space in Las Vegas, Nevada. Defendant Shushok and McCoy, Inc. (SMI), performed collection agency work on behalf of Plaintiff. Individual Defendants Matthew Travis and Matthew Turner were the owners of Defendant SMI and Richard Birdwell is a former employee of Defendant SMI (collectively, including SMI, "SMI Defendants"). Defendants Global Accents and Couture International, Inc. (Couture), are former tenants of Plaintiff.

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1 This litigation arose due to a dispute related to the leases between Plaintiff and Defendants
 2 Global Assents and Couture. Defendants Global Assents and Couture asserted the dispute was settled
 3 by SMI on behalf of Plaintiff. Plaintiff, however, asserted that its relationship with SMI concluded
 4 before SMI reached settlements with Defendants Global Assents and Couture. Accordingly, Plaintiff
 5 argued that the settlements were not enforceable. Defendants Global Assents and Couture argued
 6 that the settlements were enforceable based upon theories of principal and agency. Plaintiff brought
 7 the instant action against Defendants Global Assents, Couture, and the SMI Defendants. Defendant
 8 Global Assents asserted several counterclaims against Plaintiff and crossclaims against the SMI
 9 Defendants.

10 **B. Procedural Background**

11 On June 11 and 12, 2013, the Court conducted a bench trial on the claims remaining between
 12 Plaintiff and Defendant Global Assents (Defendant). Docket Nos. 196, 197. Thereafter, on
 13 December 27, 2013, the Court issued an Order in favor of Defendant's counterclaim "for its breach
 14 of contract claims against [Plaintiff]" and found that Defendant was "entitled to an award of damages
 15 for reasonable attorney's fees, costs, and expenses as a result of [Plaintiff's] breach of contract."
 16 Docket No. 209, at 16. A clerk's judgment in favor of Defendant was entered on December 30,
 17 2013. Docket No. 210. On January 7, 2014, Defendant filed the instant motion for attorneys' fees
 18 and costs in the amount of (1) \$70,585.72 or (2) \$83,201.42. Docket No. 213. Plaintiff filed an
 19 opposition requesting that the request for fees be denied or drastically reduced. Docket No. 220.
 20 On February 5, 2014, Plaintiff filed a notice of appeal as to the clerk's judgment. Docket No. 221.

21 **II. INITIAL MATTERS**

22 **A. Objection to District Judge's Findings of Fact**

23 In the opening portions of Plaintiff's opposition, Plaintiff requests that the motion for fees
 24 be denied in its entirety. Docket No. 220, at 2-3. The basis for this request is that Plaintiff believes
 25 the Court was incorrect in awarding fees based on the terms and conditions of the contract at issue
 26 in this case. *Id.* Thus, Plaintiff essentially objects to the District Judge's findings of fact in its
 27 response. This objection, however, would be more appropriately raised in a separate motion and not
 28 merely as a side note in the briefing for the motion for fees. Accordingly, because the District Judge

1 has unequivocally found that fees should be awarded in this case, the undersigned Magistrate Judge
2 will only address the proper amount of fees that should be awarded. This report and
3 recommendation will not address Plaintiff's objections to the District Judge's findings of fact.

4 **B. Amount of Attorneys' Fees Requested**

5 Defendant proposes two separate amounts of attorneys' fees for the Court to consider.
6 Docket No. 213, at 2, 49. The first option Defendant presents is \$49,510.80, which reflects the
7 invoiced amount of what was actually billed in this case. *Id.*, at 49. The second option Defendant
8 presents is \$68,252.50, which is based on a recalculation of fees at a rate of \$230 per hour. *Id.*
9 Plaintiff has not objected to the reasonableness of the hourly rate for the rates that were actually used.
10 Docket No. 220, at 8. Plaintiff does object, however, to the use of the recalculation rate because, it
11 asserts, such a recalculation is not necessary when it is readily apparent which rates were actually
12 billed. *Id.* The Court agrees with Plaintiff. There is no need to recalculate fees when the amount
13 billed is readily apparent.

14 In the Ninth Circuit, the starting point for determining reasonable fees is the calculation of
15 the "lodestar," which is obtained by multiplying the number of hours reasonably expended on
16 litigation by a reasonable hourly rate. *See Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th
17 Cir. 1987). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party
18 reasonably expended on the litigation by a reasonable hourly rate." *Camacho v. Bridgeport*
19 *Financial, Inc.*, 523 F.3d 973, 978 (9th Cir. 2008) (internal quotations and citation omitted). In
20 calculating the lodestar, the court must determine a reasonable rate and a reasonable number of hours
21 for each attorney. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986), *reh'g*
22 *denied, amended on other grounds*, 808 F.2d 1373 (9th Cir. 1987).

23 Here, as discussed above, Plaintiff does not object to the hourly rate actually billed. Having
24 reviewed and considered the matter, the Court finds the rate reasonable. In regard to the number of
25 hours billed, Plaintiff only disputes whether Defendant can recover for claims it lost and,
26 additionally, asserts that Defendant was overzealous in pursuing its claims. The Court, however,
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finds no evidence of overzealousness.¹ To the contrary, this is a four-year old case and Defendant still has nine outstanding claims against the SMI Defendants. As far as whether Defendant can recover for claims on which it did not prevail, the Court will address that issue below. The starting point for the Court's calculations, however, will be the invoiced amount of \$49,510.80.

III. DISCUSSION

A. Legal Standard

Pursuant to Federal Rule of Civil Procedure 54(d), a prevailing party may seek costs and fees. Fed.R.Civ.P. 54(d)(1)-(2). A party seeking fees must: (i) file the motion no later than 14 days after the entry of judgment; (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award; (iii) state the amount sought or provide a fair estimate of it; and (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made. Fed.R.Civ.P. 54(d)(2).

Local Rule 54-16(b) further requires that the motion include the following components:

- (1) A reasonable itemization and description of the work performed;
- (2) An itemization of all costs sought to be charged as part of the fee award and not otherwise taxable pursuant to LR 54-1 through 54-15;
- (3) A brief summary of the following:
 - A. The results obtained and the amount involved;
 - B. The time and labor required;
 - C. The novelty and difficulty of the questions involved;
 - D. The skill requisite to perform the legal service properly;
 - E. The preclusion of other employment by the attorney due to acceptance of the case;
 - F. The customary fee;
 - G. Whether the fee is fixed or contingent;
 - H. The time limitations imposed by the client or the circumstances;
 - I. The experience, reputation, and ability of the attorney(s);

¹Further, Plaintiff has not cited to a single entry on Defendant's invoices that it believes to be improper.

J. The undesirability of the case, if any;

K. The nature and length of the professional relationship with the client;

L. Awards in similar cases; and,

(4) Such other information as the Court may direct.

In addition, the motion for attorneys' fees and costs must be accompanied by an affidavit from the attorney responsible for the billings in the case to authenticate the information contained in the motion, and to prove that the fees and costs sought are reasonable. LR 54–16(c). A failure to provide the documentation required by LR 54–16(b) and (c) in a motion for attorneys' fees "constitutes a consent to the denial of the motion." LR 54–16(d).

B. Analysis

Defendant's motion for attorneys' fees was filed in a timely manner and meets the other procedural requirements of Fed.R.Civ.P. 54(d)(2).² Docket No. 213. Further, Defendant provided the information outlined in LR 54–16. *Id.*

(1) Reasonable itemization and description of the work performed.

Defendant seeks a total of \$49,510.80 in attorneys' fees and has provided the invoices of its two law firms, Michael B. Lee P.C. and Kravitz, Schnitzer, & Johnson, CHTD (KSJ), to show an itemization of the work performed. *See* Docket No. 213, at 5, 49. Plaintiff objects to this itemization on the grounds that the invoices do not account for time Defendant spent "(i) litigating its crossclaims against the rogue collection agency Shushok & McCoy, (ii) addressing issues involving a co-defendant, Couture International, and (iii) pursuing several claims against [Plaintiff] that it never prevailed upon." Docket No. 220, at 4. Further, Plaintiff asserts that the Court awarded fees pursuant to the release which states that an award of costs and fees are appropriate, "[i]f any suit

²Nevada follows the American rule that attorneys' fees may not be awarded absent a statute, rule, or contract authorizing such award. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90 (2006). Here, the Court has already determined that the Release Agreement provides for attorneys' fees. Docket No. 209, at 16.

1 is brought to enforce or interpret the terms of this Agreement or any obligation set out in this
2 Agreement.” Docket No. 220, at 5 (*citing* Docket No. 209, at 14). Therefore, Plaintiff argues, the
3 Court did not award attorneys’ fees for Defendant’s pursuit of claims it never prevailed on nor its
4 attack on its co-defendant. *Id.* Accordingly, Plaintiff requests that the Court apportion fees
5 according to the number of claims on which Defendant did prevail. *Id.* Specifically, Plaintiff asserts
6 that Defendant only prevailed on one of its original fifteen claims and, therefore, the Court should
7 only award one fifteenth of the attorneys’ fees requested. *Id.*

8 In reply, Defendant asserts that apportionment of fees is impractical. Specifically, Defendant
9 argues that the claim on which it prevailed was inextricably intertwined with the other claims in this
10 case because: (i) discovery against its co-defendant Shushock & McCoy Inc. (SMI) related to its
11 dispositive motions; (ii) billings related to its co-defendants SMI and Couture International Inc.
12 (Couture) were limited; and (iii) Defendant prevailed on its ultimate theory.

13 When a prevailing party pursues similar claims, based on the same factual circumstances,
14 against multiple defendants, “it is within the district court's discretion to determine whether
15 apportionment is rendered impracticable by the interrelationship of the claims against the multiple
16 defendants.” *Mayfield v. Koroghli*, 124 Nev. 343, 353-54 (2008). “The district court must, however,
17 attempt to apportion the costs before determining that apportionment is impracticable.” *Id.* Further,
18 when attempting to apportion costs, “the district court must make specific findings, either on the
19 record during oral proceedings or in its order, with regard to the circumstances of the case before it
20 that render apportionment impracticable.” *Id.*

21 In deciding whether apportionment is mandated, the court focuses on the time expended by
22 the prevailing party in pursuing each defendant, rather than on relative liability. *El-Hakem v. BJY*
23 *Inc.*, 415 F.3d 1068, 1075-76 (9th Cir. 2005) (*citing Corder v. Gates*, 947 F.2d 374, 382 (9th Cir.
24 1991)). For example, if the conduct of one defendant was the focus of the litigation and required a
25 larger portion of plaintiff's counsel’s time, it is appropriate to allocate the burden of the fee award
26 accordingly. *Corder*, 947 F.2d at 382 (*citing Communications of California v. Pacific Telephone*
27 *& Telegraph Co.*, 890 F.2d 184, 194 (9th Cir. 1989)). Further, the Ninth Circuit has concluded that
28 it is within the Court’s discretion to apportion fees between successful claims and unsuccessful

1 claims. *El-Hakem*, 415 F.3d at 1075-76 (citing *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d
2 895, 905 (9th Cir.1995) (“This approach is entirely consistent with the cases in which we have
3 applied *Hensley* to hold that a district court does not abuse its discretion when it resorts to a
4 mathematical formula, even a crude one, to reduce the fee award to account for limited success.”)).
5 However, there is no need to apportion a fee award as to the respective claims when only a small
6 percentage of the total hours expended is attributable to only partially successful claims. *El-Hakem*,
7 415 F.3d at 1075-76.

8 Here, the Court finds that the award of fees can be apportioned; however, not in the manner
9 suggested by Plaintiff. First, Defendant concedes that 2.7 hours of its time was spent consulting with
10 Couture. Docket No. 224, at 7. Defendant explains, however, that this time was spent discussing
11 “a unified defense against Plaintiff’s claims.” *Id.* Because Defendant was partially successful on
12 its claims against Plaintiff, and fully successful on its defenses against Plaintiff, the Court finds that
13 there is no need to apportion this minimal amount of time. The time was spent preparing a defense
14 against Plaintiff’s unsuccessful claims and, therefore, the award of fees should include this time.

15 Next, with regard to billings related to the SMI Defendants, Defendant’s attorney Michael
16 B. Lee represents that he did not bill any tasks related to SMI. Indeed, the SMI Defendants were
17 either in bankruptcy or default by the time this case was assigned to Mr. Lee. Therefore, the Court
18 concludes that all of Mr. Lee’s firm’s billing involved defending against and pursuing claims against
19 Plaintiff.

20 The invoices for KSJ, as well as the docket, however, clearly indicate that the focus of the
21 litigation was equally on Plaintiff and the SMI Defendants up to and until approximately April 2011,
22 when the SMI Defendants’ former counsel’s motion to withdraw as counsel was granted. Docket
23 No. 59; Docket No. 213, at 48-83. Before the SMI Defendants’ counsel withdrew, it appears that
24 Defendant spent an equal amount of time pursuing the SMI Defendants and Plaintiff. After the
25 motion to withdraw, Defendant’s focus shifted almost entirely to Plaintiff. Therefore, it is
26 appropriate to allocate the burden of the fee award accordingly. *Corder*, 947 F.2d at 382; *El-Hakem*
27 *v. BJY Inc.*, 415 F.3d 1068.

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1 From the onset of this case until April 25, 2011, when the SMI Defendants' counsel
2 withdrew, KSJ billed \$11,635.00. Docket No. 213, at 51-78. Half of that billing, \$5,817.50, can be
3 attributed to pursuing claims against the SMI Defendants and should not be included in the instant
4 fee award. Therefore, at this point in the calculation, of the \$49,510.80 in attorneys fees' requested
5 by Defendant, \$43,693.30 remains ($\$49,510.80 - \$5,817.50 = \$43,693.30$).

6 Next, Plaintiff correctly asserts that Defendant only prevailed on one of its claims; however,
7 Defendant was also successful in defending against all three of Plaintiff's claims at trial.³ Further,
8 Defendant defended against Plaintiff's two additional claims for fraud and civil conspiracy up to and
9 until Plaintiff abandoned those claims in its trial brief. *See* Docket No. 157, at 4. Accordingly, the
10 award of fees should account for the five claims against which Defendant successfully defended, as
11 well as the one counterclaim on which Defendant prevailed.

12 In regard to Defendant's breach of covenant of good faith and fair dealing claim, on which
13 it was not successful, the Court finds that it is was not so intertwined with the breach of contract
14 claim as to make apportionment impractical. In order to prevail on its breach of contract claim,
15 Defendant had to show that it subjectively believed that SMI had authority to act for Plaintiff by
16 entering into an agreement on Plaintiff's behalf. Docket No. 209, at 9. In contrast, the breach of
17 implied covenant of good faith and fair dealing claim required a showing that Plaintiff deliberately
18 countervened the intention or spirit of the contract (under contract theory) or that there was a special
19 relationship between Plaintiff and Defendant (under tort theory). *Id.*, at 8. Thus, the required
20 showings for the two claims Defendant took to trial are dissimilar enough to justify reducing the fee
21 award to account for Defendant's unsuccessful breach of covenant claim. Similarly, Plaintiff
22 dismissed its claim for deceptive trade practices in its proposed findings of facts submitted after the
23 trial. Docket No. 202, at 11. Thus, it was unsuccessful on this claim and the award of fees should
24 be reduced accordingly.

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27 ³Specifically, the Court ruled in favor of Defendant on the parties' opposing claims for breach
28 of contract, and it dismissed Plaintiff's claims against Defendant for breach of covenant of good faith
and fair dealing, and unjust enrichment. Docket No. 209, at 7.

1 Therefore, of the eight claims that originally existed between Plaintiff and Defendant,
 2 Defendant was successful on five. The Court, in its discretion, finds that awarding a pro-rated
 3 amount of fees for the successful claims is appropriate. *See El-Hakem*, 415 F.3d at 1075-76. In this
 4 case, that totals \$32,769.98 (6/8 x \$43,693.30 attorneys' fees remaining after reduction for portion
 5 of litigation focused on SMI Defendants).

6 (2) An itemization of all costs sought to be charged as part of the fee award and not
 7 otherwise taxable pursuant to LR 54-1 through 54-15.

8 In its original motion, Defendant did not provide an itemization of the costs in this matter,
 9 but instead spoke of an arrangement whereby costs would be assessed to Plaintiff at the rate of \$50
 10 per month. Docket No.213, at 5; Exhibit B. Plaintiff objected to Defendant's costs on the grounds
 11 that Defendant did not provide the proper documentation. Docket No. 220, at 6. In its reply,
 12 Plaintiff indicated that it would provide a proper bill of costs, but that it required more time to do
 13 so. Docket No. 224, at 8. Nineteen days later, on February 26, 2014, Defendant filed a bill of costs.
 14 Docket No. 228. Plaintiff objected on the grounds that it was untimely. Docket No. 234.

15 Fed.R.Civ.Pro. 54 contains no time limit for when a bill of costs must be filed after the entry
 16 of the judgment. However, Local Rule 54-1(a) provides that the prevailing party shall serve and file
 17 a bill of costs and disbursements on the form provided by the clerk no later than 14 days after the
 18 date of entry of the judgment or decree. LR 54-1. When a bill of costs is untimely, the prevailing
 19 party is not entitled to recover costs unless there is a showing of excusable neglect. *See Holmes v.*
 20 *Merck & Co., Inc.*, 2008 WL 4791042 (D. Nev. Oct. 29, 2008). Here, Defendant's bill of costs was
 21 filed 58 days after the entry of judgment and, therefore, was untimely. *See* Docket No. 228.
 22 Defendant has not shown excusable neglect. Accordingly, Defendant is not entitled to recover the
 23 costs listed in its bill of costs. Docket No. 228.

24 Despite Defendant's failure to provide its bill of costs in a timely manner, Defendant did
 25 present the Declaration of Parham Partielli, the manager of Global Accents, in its original motion
 26 for attorneys' fees and costs. Docket No. 213, at 85. In this Declaration, Mr. Partielli declared that
 27 Global Accents incurred the following costs in litigating the instant case: \$600 for travel (consisting
 28 of six separate flights); \$150 for rental/transportation; and \$360 for hotel bills - for a total of \$1,100.

1 The Court finds that this Declaration contains a proper itemization of costs, and that the costs are
2 reasonable. Therefore, the Court awards Defendant \$1,110 in costs.

3 (3) Factors outlined in LR 54–16(b)(3)

4 Defendant’s motion contained the 12 factors outlined in LR 54–16(b)(3) and Plaintiff
5 addressed each factor in its response. Docket Nos. 213, 220. Ultimately, however, as discussed
6 above, Plaintiff does not dispute the reasonableness of the hourly rate invoiced in this action. *See*
7 Docket No. 220, at 8. Plaintiff does dispute whether Defendant can recover for claims it lost and,
8 additionally, asserts that Defendant was overzealous in pursuing its claims. As discussed above,
9 however, the Court found no evidence of overzealousness and, further, the Court has already reduced
10 the amount of fees in part based on the success of claims.

11 Having reviewed the parties’ perspectives on the 12 factors outlined in LR 54–16(b)(3), as
12 well as the arguments therein, and the invoices of Michael Lee and KSJ, the Court finds no need to
13 adjust the award for fees up or down. The Court finds that the amount of hours expended and the
14 billable rates used are reasonable. Thus, Defendant is entitled to the requested attorneys’ fees in the
15 amount of \$32,769.98.

16 (4) Interest

17 Defendant requests reimbursement for the interest on the monies it had to pay in fees in this
18 case at the rate of 5.25%. Docket No. 213, at 8. Plaintiff has not objected to the request for interest
19 and agrees that interest should be calculated at the rate of 5.25%. Docket No. 220, at 10.

20 Pursuant to N.R.S. 17.130, “[w]hen no rate of interest is provided by contract or otherwise
21 by law, or specified in the judgment, the judgment draws interest from the time of service of the
22 summons and complaint until satisfied.” Here, the contract does not specify the rate of interest and
23 therefore, 5.25% is the rate that shall apply. *See* N.R.S. 17.130(2). The interest shall be calculated
24 from the date that the summons and complaint were served on Defendant.

25 **V. CONCLUSION**

26 Based on the foregoing, and good cause appearing therefore,

27 IT IS THE RECOMMENDATION of the undersigned United States Magistrate Judge that
28 Defendant Global Accents, Inc.’s Motion for Attorneys’ Fees and Costs Pursuant to Rule 54(d) and

1 LR 54-16; Amended Judgment for Award of Fees, Expenses, and Costs. (Docket No. 213) be
2 GRANTED in accordance with this Report and Recommendation.

3 IT IS THE FURTHER RECOMMENDATION of the undersigned United States Magistrate
4 Judge that Plaintiff pay Defendant attorneys' fees in the amount of \$32,769.98 plus 5.25% interest
5 from the time of service of the summons and complaint, and costs in the amount of \$1,100.

6 DATED: March 19, 2014.

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10 NANCY J. KOPPE
11 United States Magistrate Judge

12 **NOTICE**

13 Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must**
14 **be in writing and filed with the Clerk of the Court within 14 days of service of this document.**

15 The Supreme Court has held that the courts of appeal may determine that an appeal has been waived
16 due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142
17 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2)
18 failure to properly address and brief the objectionable issues waives the right to appeal the District
19 Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951
20 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir.
21 1983).